

LEONG HOONG KHIE

a

v.

PUBLIC PROSECUTOR & ANOTHER CASE

FEDERAL COURT, KUALA LUMPUR

WAN SULEIMAN FJ

GEORGE SEAH FJ

b

HASHIM YEOP SANI FJ

[CRIMINAL APPEAL NOS. 21 & NO. 22 OF 1984]

3 DECEMBER 1984

CRIMINAL LAW AND PROCEDURE: *Dangerous Drugs - Section 39B(1)(a) of Dangerous Drugs Act 1952 - Death sentence - Appeal - Conviction and sentence quashed - Discharge - Whether there should be a new trial.*

c

EVIDENCE: *Hearsay evidence - General rule - Exceptions - Subramaniam's case - Res gestae - Result of admissibility of inadmissible evidence.*

Both the appellants were jointly charged for trafficking in dangerous drugs in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 on the 18 April 1981. They were both found guilty by the High Court at Penang on the 31 March 1984 and were sentenced to death. This is an appeal from the sentence.

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Judgment of the Court was delivered by George Seah FJ.

Held:

[1] The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person - see *Teper v. R* [1952] AC 480 at 486.

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[2] There are certain exceptions which have been recognised on the grounds of necessity or convenience - see s. 32 of the Evidence Act 1950.

[3] Hearsay evidence may in certain very limited circumstances be admitted within the general proposition expounded by the Privy Council in *Subramaniam v. PP* [1956] MLJ 220 and which was affirmed in *Mawaz Khan v. The Queen* [1967] 1 AC 454 and in *Ratten v. The Queen* [1972] AC 378.

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[4] The general proposition laid down in *Subramaniam's* case must be read subject to the consideration that the statement must be directly relevant in considering the state of mind of the witness to whom it had been made. The proposition could only apply when the mental state of the witness evidenced by the statement was itself directly in issue at the trial.

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[5] The prosecution had failed to satisfy the strict test laid down in *Subramaniam's* case. Consequently all the statements allegedly made by the informers to PW1 are to be treated as hearsay evidence and therefore inadmissible in law and should have been rejected by the learned Judge.

[6] The *res gestae* rule was held to be inapplicable on the facts of this case.

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[7] The Court was of the opinion that the admissibility of the hearsay evidence had seriously prejudiced the fair trial of the appellants and had resulted in a miscarriage of justice.

[8] Taking into account all the oral evidence that was relevant, it would be unsafe to allow the conviction to stand.

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- a* [9] For the above reasons, the Court did not direct a new trial but quashed the conviction and sentence and ordered that both appellants be discharged and acquitted.

[Appeal allowed.]

Cases referred to:

- b* *Teper v. R* [1952] AC 480
Subramaniam v. PP [1956] MLJ 220
Mawaz Khan v. The Queen [1967] 1 AC 454
Ratten v. The Queen [1972] AC 378

Legislation referred to:

- Dangerous Drugs Act 1952, s. 39B(1)(a)
Evidence Act 1950, ss. 32, 6, 32(a), 155(c)
- c* *For the appellant Leong Hoong Khie - Rajasingam; M/s. R. Rajasingam & Co.*
For the appellant Tan Gong Wai - Darshan Singh; M/s. Darshan Singh & Co.
For the public prosecutor - Fong Seng Yee, SFC

JUDGMENT

d **George Seah FJ:**

After considering the submissions of learned Counsel for the appellants and the learned DPP we quashed the conviction as well as the sentence, allowed the appeal and ordered that both appellants be discharged and acquitted. We indicated that we would give our reasons at a later date and this we now do.

- e* Both the appellants were jointly charged for trafficking in dangerous drugs, to wit 420.7 grammes of heroin in contravention of para. (a) of sub-section (1) of s. 39B of the Dangerous Drugs Act 1952 on 18 April 1981. They were found guilty by the High Court at Penang on 31 March 1984 and sentenced to death.

The foundation of the prosecution case was based mainly on the oral testimony of Liew Chuan Siew (PW1), a Senior Customs Officer attached to the Preventive branch, Penang and his evidence may be summarised as follows:

- f* (a) **On 15 April 1981 PW1 received a telephone call from informer No. 817 suggesting a meeting.** On the following day, in the company of his superior officer, Mohamed Saad (PW3) they met Informers Nos. 817 and 822 at Peking restaurant, Penang where **PW1 and PW3 were informed by the 2 informers that there would be a transaction involving 8 lbs. of heroin and the respective role the informers would play.**
- g* (b) **On 18 April 1981 PW1 got another phone call requesting an immediate meeting** and all four of them met at the same restaurant. **The informers told PW1 and PW3 that the proposed transaction would take place that afternoon at Springtide Hotel, Penang and that they would arrive in a Mazda car No. AAK 3908 accompanied by Tan Gong Wai (later identified as appellant (Tan)).**
- h* (c) As a result of this information, PW1 led a party of customs officers to Springtide Hotel arriving there at about 12.45 p.m. Some time later, a Mazda car arrived and three persons alighted, viz. the 2 informers and appellant (Tan). They entered the restaurant and engaged in conversation. After fifteen minutes they left but just as they were doing so, **one of the informers indicated by a hand signal to PW1 to stay behind.**

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- (d) **After a while PW1 received a phone call from one of the informers suggesting that PW1 take his party of customs officers to the junction of Scotland Close and Jalan Scotland, Penang.** PW1 and his party proceeded to the junction and waited. At 2.30 p.m. PW1 saw the Mazda car approaching and turned into Ayer Itam Road stopping in front of No. 8, Medan Goh Guan Ho. PW1 saw three male Chinese came out of the car and went into the house. From this ambush position PW1 (which was about 30 yards away) said that he could see any person going in and leaving house No. 8. a
- (e) At 3.30 p.m. PW1 saw one of the informers and appellant (Tan) leave the house, entered into the Mazda car and drove away. Some fifteen minutes afterwards, the other informer came out of the house and walked towards Taman Race Course. **PW1 approached him and was informed by informer that the Mazda car would return soon with “the stuff”, viz. heroin.** After saying this, the informer went back into the house and PW1 to his ambush position. b
- (f) At 4.30 p.m. the Mazda car returned and stopped in front of No. 8 Medan Goh Guan Ho. PW1 saw three persons alighted, viz. the informer, appellant (Tan) and a third person whom he did not know but he was seen carrying a black plastic bag. He was later identified as appellant (Leong). All three persons then went into the house. A few minutes later, a motor-cyclist arrived and he too entered the house. He was PW2, Tay Liang Boo. c
- (g) After directing his officers to position themselves behind the house to cut off any attempt to escape, PW1 led his party and rushed into house No. 8, shouting “Customs” as they entered. PW1 said he saw appellant (Leong) throwing away the black bag and he recovered it from the floor in the hall. On opening, he found two packets containing light brown granular substance which he suspected to be heroin. His suspicion was confirmed by the chemist report (P9). d
- (h) In the hall PW1 found two women, viz. Jenny Goh and Ong Saw Hoon (f) (PW9), in addition to the other four male Chinese seen entering house no. 8 earlier on. e
- (i) Following this the 2 appellants (Leong and Tan) were duly arrested and jointly charged for trafficking under the Dangerous Drugs Act 1952. f

The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as fundamental principle of the law of evidence. To quote Lord Normand in *Teper v. R* [1952] AC 480 at 486:

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost. g

In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule certain exceptions have been recognised upon the ground of necessity or convenience. In Malaysia, these exceptions are set out in s. 32 of the Evidence Act 1950. Since neither the learned Counsel for the appellants nor the learned DPP seems to rely on any of these statutory provisions no more need be said about them in this judgment. However, hearsay evidence may in certain very limited circumstances be admitted within the general proposition expounded by the Privy Council in the case of *Subramaniam v. PP* [1956] MLJ 220. The appellant in that case was charged with being in possession of firearms without lawful excuse and his defence was that he was acting under duress in consequence of threats uttered by the h

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- a* terrorists. The trial Judge would not allow the accused to narrate in the witness box what had been said by the terrorists and the Privy Council advised that the conviction should be quashed because the “statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to confirm to their wishes”.
- b* In the early part of its opinion the Privy Council said:
- Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the witness, not the truth of the statement, but the fact that it was made.
- c* This statement has been accepted by the Privy Council in *Mawaz Khan v. The Queen* [1967] 1 AC 454 and *Ratten v. The Queen* [1972] AC 378. In *Ratten* case Lord Wilberforce said at p. 387:
- A question of hearsay only arises when the words spoken are relied on “testimonially”, i.e. as establishing some facts narrated by the words.
- d* The learned DPP appeared to have conceded that all the statements allegedly made by the informers to PW1 (which we have underlined) were to be regarded as hearsay but he argued before the learned Judge and repeated the same argument before us that he sought to have these statements admitted although both these informers were not called as prosecution witnesses, not to prove the truth of their contents but the fact that they were made. The learned DPP purported to rely on the *Subramaniam* case (*supra*). In our opinion, the general proposition laid down by the Privy Council in that case must be read subject to this condition,
- e* viz. that the statement must be directly relevant in considering the state of mind of the witness to whom it had been made. In other words, the proposition could only apply when the mental state of the witness evidenced by the statement was itself directly in issue at the trial. What a witness said or heard said might well be the best and most direct evidence of that witness’s state of mind. Support for this very restricted construction may be found in the *Subramaniam*
- f* case (*supra*) where the Privy Council said at p. 222:
- The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.
- g* Now, what was the purpose of introducing these statements allegedly made by the informers to PW1 on 15 April 1981, 16 April 1981 and 18 April 1981? The learned DPP had given his reasons for doing so and we need not repeat them. Suffice for us to say that in our opinion, the learned DPP had failed to satisfy this strict test laid down in *Subramaniam* case (*supra*).
- h* Since the mental state of both the appellants was not in issue at the trial, this condition had not been satisfied. Having failed to comply with this requirement, in our judgment, all the statements allegedly made by the informers to PW1 (which we have conveniently underlined) are to be treated as hearsay evidence and therefore inadmissible in law. They ought to have been rejected by the learned Judge.
- i* In the ruling given at the conclusion of the trial the learned Judge gave four reasons for holding that these statements allegedly made by the informers to PW1 were relevant and admissible:

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| (1) To rebut the defence of the accused persons; | <i>a</i> |
| (2) To explain the reaction of PW1 in acting on those statements in the manner he did; | |
| (3) They formed part of the transaction leading up to the principal act, viz. trafficking in dangerous drugs and | |
| (4) They were antecedent transactions and as such, could not be a narrative of what happened. | <i>b</i> |

With respect to the learned Judge, none of these reasons constituted a valid one in law for admitting hearsay evidence within the proposition formulated by the Privy Council in *Subramaniam* case (*supra*). Nor did any of them come within the statutory exception to the hearsay rule contained in s. 32 of the Evidence Act 1950.

Next, the learned Judge held that these statements allegedly made by the informers to PW1 on various dates prior to the arrest of the appellants on 18 April 1981 could be admitted under s. 6 of the Evidence Act 1950 as part of the <i>res gestae</i> . Reliance appears to have been placed in the case of <i>Ratten v. The Queen</i> (<i>supra</i>). In that case, a woman's voice was heard on the telephone "Get me the police please" and gave the address 59 Mitchell Street. Before the operator could make the connection to the police the caller hung up. Shortly afterwards the caller was shot dead by her husband who asserted that his gun went off accidentally while he was cleaning it. The Privy Council held that the words were admissible as part of the <i>res gestae</i> . These words uttered by the deceased woman were given by the telephone operator who was called as a prosecution witness. In that case the cause of death was in issue and the decision of the Privy Council could be explained on the ground it might be treated as coming within subparagraph (a) of s. 32 of the Evidence Act 1950. The facts of that case are clearly different from the present case.	<i>c</i>
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Furthermore, the authorities appear to establish that the *res gestae* rule should be applied strictly to prevent concoction and fabrication. No binding authority has been cited to prove that hearsay evidence spanned over a period of several days had been admitted as part of the *res gestae*. In *Ratten case* (*supra*) Lord Wilberforce seems to rule against it and His Lordship said:

Conversely, if he (trial Judge) considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he (trial Judge) should exclude it. And the same must in principle be true of statements made before the event...

We therefore hold that the <i>res gestae</i> rule does not and cannot apply to the facts of this case.	<i>f</i>
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Although much research and efforts appeared to have been made by the learned Judge in writing his ruling and judgment we regret we are unable to agree with his conclusion. In our judgment, none of the grounds relied on by the learned Judge was valid in law or could be supported by the well-recognised authorities. For these reasons, we are of the opinion that the statements allegedly made by the informers to PW1 ought to have been ruled inadmissible in law.	<i>h</i>
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After discarding what had been improperly admitted we had to decide whether the remaining oral evidence produced at the trial was sufficient to support the conviction. As against the appellant (Leong) there was the testimony of PW1 who alleged that he saw appellant (Leong) carrying a black plastic bag which was later found to contain the dangerous drug into the	<i>i</i>
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- a* house at No. 8 Medan Goh Guan Ho. PW1 also claimed to see the appellant (Leong) throwing the bag away when PW1 stormed into the house with party of Customs Officers. This piece of evidence of PW1 was however, contradicted by PW2 (Tay Liang Boo) and PW9 (Ong Saw Hoon). If PW1 had actually seen what he claimed, no satisfactory explanation was offered why he should question those present in the living-room (a) who was the owner of the bag? (b) Who was the owner of its contents? (c) Who put the bag on the floor? In our opinion, such questions do not appear to be consistent with the claim of PW1 of having seen appellant (Leong) carrying and throwing away the black plastic bag.

- c* The other oral evidence purporting to connect the appellant (Tan) with the charge was given by PW2. At the time when he gave his testimony PW2 was serving a prison sentence for possession of dangerous drugs. When he was first called as a prosecution witness his testimony did not implicate both the appellants in any way. The learned DPP applied to treat him as a hostile witness and sought leave of the Court to impleach him under s. 155(c) of the Evidence Act 1950 by reference to a previous statement (ID7) allegedly made by him to PW3 (Mohd. Saad), Superintendent of Customs (Preventive Branch) Penang. Leave was duly given by the learned Judge and PW2 was cross-examined by the learned DPP but defence Counsel reserved their questioning of this prosecution witness. Sometime later, PW2 intimated to the Court that he wished to speak the truth and he was recalled and reaffirmed.
- d* After giving evidence incriminating both the appellants the learned DPP applied to the Court for leave to examine PW2 with a view to establishing that the statements ID7 was the truth. Despite objection by learned Counsel for the defence the learned Judge granted the application. Under cross-examination by learned Counsel for the appellant (Tan) PW2 said:

- e* Yes, I was high on drugs when I made ID7 and also, I made ID7 because they said I would be released. By "they" I mean the C.Os (Customs Officers).

In reply to answer put by learned Counsel for the appellant (Leong) PW2 said.

Yes, I was induced to make ID7 in that I was promised by the Customs that if I made a statement I would be released.

- f* In our opinion, it was plain that PW2 was induced by the Customs Officers to make ID7 and the learned Judge was right to rule that it had not been proved to have been made voluntarily. It follows that ID7 was not admissible in evidence. As such, no reference to it or its contents should have been made by the learned DPP at the trial. In our opinion, PW2 appears to be an unreliable witness.

- g* In our judgment, the hearsay evidence of the informers was so inter-woven with the testimony of the principal prosecution witness PW1 that its misreception had seriously prejudiced the fair trial of the appellants and had resulted in a miscarriage of justice. Having regard to the other oral evidence which we have alluded to and commented upon, we think it unsafe to allow the conviction to stand as we are of the opinion that there was no satisfactory oral evidence to support the conviction. For the above reasons, we do not direct a new trial but quashed the conviction and sentence and ordered that both appellants be discharged and acquitted.
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Also found [1986] 2 CLJ 291